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IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1962.

No. 217.

JOSEPH E. COOK et al.,
Petitioners,

vs.

THE BOARD OF EDUCATION OF THE CITY OF NASHVILLE, TENNESSEE, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

BRIEF OF THE RESPONDENTS,
County Superintendent of Public Instruction of Davidson County, Tennessee, et al., Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 217.

JOSEPHINE GOSS et al.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, et al.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

RESPONDENTS' BRIEF.

These respondents adopt the statement as contained in the brief for the petitioners as to "Opinions Below," "Jurisdiction," and "Question Presented" (Brief for Petitioners, pp. 1-2).

CONSTITUTIONAL PROVISION INVOLVED.

These respondents respectfully submit that this case involves both Sections 1 and 5 of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT

These respondents adopt the "Statement" as contained in the brief for the petitioners other than the "Evidence and Holdings" section thereof, with such additional statement as appears herein, said portion of such "Statement" adopted being that portion appearing in the brief of the petitioners, pp. 3-6.

These respondents respectfully submit that the entire plan as submitted by the County Board of Education of Davidson County, Tennessee, should be considered in determining the question presented to the Court. For that reason and for the convenience of the Court, these respondents submit as an additional statement of the case the full text of such plan, to wit:

PLAN

1. Compulsory segregation based on race is established in Grades One through Four of the Davidson County Schools for the second semester of the 1960-61 school year beginning January, 1961, and thereafter for one additional grade beginning with each subsequent school year, i. e., for Grade Five in September, 1961, Grade Six in September, 1962, etc.

2. A plan of school zoning, based upon location of school buildings, transportation facilities and the most recent scholastic census, without reference to race, will be established for the administration of the first grade, and other grades as they are desegregated according to the gradual plan.

3. Students entering the first grade will be permitted to attend the school designated for the zone in which he or she resides, subject to regulations that may become necessary in particular cases.

4. Application for transfer of first grade students and subsequent grades according to the gradual plan [Col. 47(a)] from the school of their zone to another school will be given careful consideration and will be granted when made in writing by parents, guardians, or those acting in the position of parents, when good cause therefor is shown and when transfer is practicable and consistent with sound school administration.

5. The following will be regarded as some of the valid conditions for requesting transfer:

a. When a white student would otherwise be required to attend a school previously serving colored students only.

b. When a colored student would otherwise be required to attend a school previously serving white students only.

c. When a student would otherwise be required to attend a school where the interests of students in that school, or in his or her grade, are of a different race.

6. A plan of equal participation by all eligible students in and in formulating nonracial arrangements for the operation of schools in the Fall, such as available space, teaching aids, textbooks, equal participation, zoning, and transportation facilities, will be established.

7. Transportation will be provided to all students that are eligible for this service.

8. As respects the separate classes attended by [illegible] students, there will be no segregation based [illegible], and notice of such will be immediately given

[illegible] June 10 [illegible]

by the School Board to all teachers in the Davidson County school system, both Negro and white, of the availability of these classes.

9. The Davidson County School Board will, prior to the beginning of the Second Semester of the 1960-1961 school year, and prior to the beginning of each school year thereafter, give specific notice to the parents of all school children of the zone in which their children fall for the purpose of attending classes.

(R. 230-232, 242.)

Evidence and Holdings.

These respondents have no quarrel with the statement of the "Evidence and Holdings" as contained in petitioners' brief, pages 10-11, excepting that statements are made out of context and the statement is not complete. Accordingly, in addition to the statements contained therein, respondents would direct to the attention of this Honorable Court the following:

Under the plan all children are zoned into appropriate school zones. This requires that the child go to the school zone in which he has been zoned, unless an application is made by the parent of the child for permission to transfer to another school zone in which such child is not zoned. The original zoning and the request for permission are equally applicable to all children and their parents, regardless of race (R. pp. 254-255).

Such applications for transfer are not new and novel in a school system, but are historically a part of the school system and have nothing to do with race (R. p. 255). Each application for transfer is considered, both upon the basis of the reason for the transfer and the effect on sound school administration under the terms of the plan

itself (R. p. 231). Out of 405 Negro children, all, except 51, requested transfers to schools where the Negro race was predominant, with better than 12 percent remaining in the school zones to which they were assigned under the zoning plan adopted, without regard to race (R. p. 265). Experience in the area, and especially in the City of Nashville system, had indicated that such voluntary transfers have been in the interest of children of all races, experiencing integrated school attendance for the first time (R. pp. 278-279).

SUMMARY OF ARGUMENT.

1. The transfer provision of the Davidson County Board of Education plan for desegregation affords equal protection to persons of all races; and voluntary segregation is not in violation of the Fourteenth Amendment to the Constitution of the United States.

2. The transfer provisions in the plan were justified in the opinion of the District Judge at the present time, and the matter has been retained on the docket of the District Court so that the transfer provisions could be deleted when or if they become unnecessary or their administration judicially scrutinized, all in keeping with the intent of this Court, as expressed in the case of **Brown v. Board of Education**, 349 U. S. 294.

3. Under Section 5 of the Fourteenth Amendment to the Constitution of the United States it is the duty of the Congress to enforce the provisions of the Fourteenth Amendment by appropriate legislation rather than the duty of the Courts to so legislate.

ARGUMENT.

I.

Racial segregation in the public school systems of the United States by **operation of law** is no longer permitted since the decisions of this Court in **Brown v. Board of Education**, 347 U. S. 483 and 349 U. S. 294. Neither these opinions nor any other opinions of this Court require racial integration by operation of law.

The only feature of the plan adopted by the Davidson County Board of Education being challenged before this Court at this time is the provision which permits a child acting through its parent to voluntarily leave a school which is integrated to attend another school. There are many reasons why the parents of either a Negro child or a white child might desire to have that child transferred to another school and such reasons become even more realistic when the child is zoned into a school where it is in the racial minority. Some such considerations on the parts of parents, both Negro and white, would be the desire to avoid a radical departure from custom; or the fear of student friction as a result of rapid departure from the status quo. Deletion of the transfer provision from the plan would have the effect of preventing the school board from giving **consideration** to requests for transfer by a parent who felt that the welfare of his or her child would be promoted by such transfer.

Such consideration by the local school boards is not a system of public education with racial discrimination, but rather is a public education system in which the school authorities retain the primary responsibility for the solution of problems which arise when there is a sudden change over from a system which has been historically segregated

by operation of law to a system which is not segregated by operation of law.

Equal protection is afforded the members of both races, since both races may make application and have consideration given to the same for the same reasons and there is no indication in this record that there has been any deviation from such equal consideration. Accordingly, such a plan is in keeping with the opinion of this Court in **Brown v. Board of Education**, 349 U. S. 294, 299, where this Court stated:

> "Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems;"

These respondents feel that the reasoning of Judge McAllister in the case of **Kelley v. Board of Education of City of Nashville, etc.**, 270 F. 2d 209, 228 (6th Cir., 1959), is so clear, cogent and persuasive that we adopt it as Respondents' argument herein and quote the pertinent parts:

> "We come, then, to the transfer provision of the plan, allowing the voluntary transfer of white and Negro students, who would otherwise be required to attend schools previously serving only members of the other race; and allowing the voluntary transfer of any student from a school where the majority of the students are of a different race. This provision does not fall within the ban of the maintenance of segregated public schools by cities where permitted—though not required—by statute, such as was condemned by the Supreme Court in Brown v. Board of Education, 347 U. S. 483, 74 S. Ct. 686, 98 L. Ed. 873. The district court, in the instant case, considered that, in accordance with the reasoning in Briggs v. Elliott,

D. C. S. C., 132 F. Supp. 776, 777, the transfer provisions did not violate the equal protection clause of the Fourteenth Amendment. In the Briggs case, it was declared, as we have heretofore mentioned, that the Supreme Court has not decided that the states must deprive persons of the right of choosing what schools they attend, but that all it has decided is that a state may not deny to any person, on account of race, the right to attend any school that it maintains. 'This,' said the court, as we have previously quoted, on another aspect of this case, 'under the decision of the Supreme Court, the state may not do directly or indirectly; but if the schools which it maintains are open to children of all races, no violation of the Constitution is involved even though the children of different races attend different schools. * * *' Appellants say that the transfer plan is only a scheme to evade the decisions of the Supreme Court. In Cooper v. Aaron, 358 U. S. 1, 17, 78 S. Ct. 1401, 1409, 3 L. Ed. 2d 5, it was said: 'In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this court in the Brown case, can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."' There is no evidence before us that the transfer plan is an evasive scheme for segregation. If the child is free to attend an integrated school, and his parents voluntarily choose a school where only one race attends, he is not being deprived of his constitutional rights. It is conceivable that the parent may have made the choice from a variety of reasons—concern that his child might otherwise not be treated in a kindly way; personal fear of some kind of economic reprisal; or

a feeling that the child's life will be more harmonious with members of his own race. In common justice, the choice should be a free choice, uninfluenced by fear of injury, physical or economic, or by anxieties on the part of a child or his parents.

Nevertheless, as stated in Brown v. Board of Education, D. C., 139 F. Supp. 468, 469, 470, subsequent to the decision of the Supreme Court in the prior Brown case:

> 'Desegregation does not mean that there must be intermingling of the races in all school districts. It means only that they may not be prevented from intermingling or going to school together because of race or color.'

While, in the instant case, the parent makes the choice for the small child, that is the only reasonable method, if such a choice may be made. We see no deprivation of right, under the evidence before us. Doubtlessly, fewer Negro children, or their parents, will avail themselves of the transfer provisions, as grade after grade becomes integrated, and more Negro children attend such desegregated schools as time goes on."

Petitioners rely upon the case of **Boson v. Rippy**, 285 F. 2d 43 (Fifth Cir. 1960). The ultimate result in that case we confess is in conflict with the decision of the United States Court of Appeals for the Sixth Circuit in the **Kelley** case, *supra*. A careful reading of the **Boson** case, however, and especially the supplemental opinion in the case, would indicate that the United States Court of Appeals for the Fifth Circuit actually deleted the transfer provision from the plan because such would apply a rule of law to the desegregated public schools from the Dallas

School District different from that applicable to other public schools in the State of Texas. That question is not applicable here. On the question of classification according to race, the United States Court of Appeals for the Fifth Circuit said only that:

> "We are so **doubtful** of the validity of the provisions of paragraph 6 that we think they should not be included in the plan."

This doubt seems to have been predicated upon the notation by the three members of the Supreme Court of the United States who thought certiorari should be granted in the **Kelley** case is that the transfer provision constituted "an absolute" ground for transfer of students.

Such a conclusion could result only from a failure to consider the entire plan. Section 4 of the plan as approved by the District Court in both this case and in the **Kelley** case (R., Maxwell 70a), provides only that transfer applications will be **given consideration** when such transfer is practicable and consistent with sound school administration.

Petitioners also rely upon the case of **Dillard v. School Board of City of Charlottesville, Va.**, 308 F. 2d 568 (Fourth Circuit, 1962). In that case it was obvious to the Court that the assignment of pupils and the application of the transfer provision was being administratively applied so as to prevent progress in the desegregation of the schools. In view of that the United States Court of Appeals for the Fourth Circuit to meet such discrimination in the application of the plan held that as respects the sexenteen plaintiffs, elementary Negro pupils, they would be admitted to schools of their choice for the next school year. This opinion was supported by only three of the Circuit Judges and two of the Circuit Judges dissented for the reasons that the plan was fair; the Fourteenth

Amendment did not guarantee the students an integrated school to attend; and any segregation was not the result of the plan but of individual choices of individual students. Respondents respectfully submit that the basis of the dissent is well founded in reason, in equity and in law.

II.

Respondents concede that the local situation in some areas may be such that the transfer provision is unnecessary in the orderly operation of the desegregation plan—either in its transitional period or on a permanent basis. Consideration of the factors making necessary or unnecessary a voluntary transfer provision in each community or region is the duty of the District Court working with the local school board. To fully comply with the duty delegated to the local courts by this Honorable Court, the need for transfer provisions must be considered by the District Courts in approval of plans. In some districts the very reasons which, in the opinion of the District Judge in the instant case, justified such transfer provisions might not be present. If so, then the transfer provision would not be consistent with the opinion of this Court in the **Brown** case, supra.

Further, these respondents freely concede that as desegregated schools become the custom of the community, rather than segregated schools, the need for such transfer provisions as a part of the plan becomes less imperative or desirable. For these and other reasons the judgment of the Court retained this case on the docket of the Court during the period of transition to the end that if time proves the lack of need for such transfer provision, it could be deleted, or if the same was used improperly or to perpetuate or effectuate discrimination, such could be terminated by the Court.

Such is in keeping with the decision of this Court in **Brown v. Board of Education**, 349 U. S. 294, 299, wherein it is stated:

> "Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal."

And it was, we respectfully submit, for just such a purpose that this Court directed in that case that:

> "During this period of transition, the courts will retain jurisdiction of these cases."

III.

The principle of equal protection of the laws is defined in Section 1 to the Fourteenth Amendment of the Constitution of the United States. The definition of how Article 1 applied to the field of public education has been enunciated by this Court.

Section 5 of the Fourteenth Amendment to the Constitution provides:

> "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Under the separation of powers so clearly set forth in the Constitution, it is the duty of the Congress of the United States, and not of the courts, to enforce the rights of the parties as defined by this Court in its decisions.

Respondents recognize that this is not in keeping with some of the previous statements of this Court and is not in keeping with the method which has been followed in dealing with the several desegregation cases. But it is the method directed by the Constitution and is, it is re-

spectfully submitted, the method which should be followed for the enforcement of the rights of the citizens involved; and until such time as the Legislative Branch of the Government has acted in accordance with the mandate given it in the Constitution to enact such legislation as is necessary to enforce Section 1 of the Fourteenth Amendment, the courts are violating the provisions of that same Constitution and that same section of the Constitution which they allegedly are upholding. Accordingly for this additional reason, respondents respectfully submit that this Court should at this time refuse to interfere with the decision of the District Court.

CONCLUSION.

We therefore respectfully submit that the decision of the United States Circuit Court for the Sixth Circuit in the case of **Henry C. Maxwell, Jr., et al. v. The County Board of Education of Davidson County, Tennessee, et al.**, should be affirmed.

Respectfully submitted.

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